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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHELLE NESTER,

Defendant and Appellant.

D036948

(Super. Ct. No. SCD154519)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh and Howard H. Shore, Judges. Affirmed.

Michelle Nester entered a negotiated guilty plea to possessing methamphetamine (Health & Saf. Code, § 11378) after the trial court denied a motion to suppress evidence (Pen. Code, § 1538.5). The court suspended imposition of sentence and placed her on three years' probation. Nester contends the trial court erred in denying the motion to suppress. We affirm the judgment.

FACTS

On July 31, 2000, San Diego police stopped Maria Prieto. She was driving a car reported as stolen. Prieto told the officers she had borrowed the car from Nester and that Nester lived at 4430 Maple Street with Vincent Gallegos. Detective Morales spoke with the car owner, who was Nester's mother. Nester's mother told him she had not given anyone permission to take or drive the car. Morales conducted surveillance of 4430 Maple Street on three occasions during early August. He twice saw Nester leave the residence and go to a car parked in front of the apartment. The car was registered to Gallegos, who was confirmed to live at the address. Morales conducted a records check and determined that Nester was on probation and had waived her Fourth Amendment rights. The probation condition stated, "[s]ubmit your person, property, personal effects, vehicle and residence to search at any time of the day or night by any probation officer or law enforcement officer with or without a search warrant and with or without reasonable cause."

On August 7, several officers entered the apartment at 4430 Maple Street and arrested Nester. The officers found methamphetamine and drug paraphernalia in the apartment.

DISCUSSION

I

Nester contends her Fourth Amendment rights were violated because the alleged probation search was a subterfuge for an ongoing criminal investigation unrelated to her probation status. Nester recognizes that a probationer may consent to a waiver of her

Fourth Amendment rights. (See *People v. Bravo* (1987) 43 Cal.3d 600, 606-607.) She also recognizes that the California Supreme Court in *People v. Woods* (1999) 21 Cal.4th 668, 678-681 held that an officer's subjective motivation in conducting a search pursuant to a probation waiver is irrelevant as long as the officer's actions are objectively justified. Nester argues we should disregard this Supreme Court holding and follow recent opinions of the Ninth Circuit Court of Appeals, which hold that a search pursuant to a Fourth Amendment waiver must be a true probation search and not an investigative search. (See *U.S. v. Ooley* (9th Cir. 1997) 116 F.3d 370, 372.) While we respect the opinions of the Ninth Circuit Court of Appeals, we are required to follow controlling precedent of California's highest court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because the search here was objectively reasonable, we need not consider Detective Morales's subjective motivation.

II

Nester contends search of 4430 Maple Street exceeded the scope of her Fourth Amendment waiver because there was insufficient evidence she resided at that address. Nester waived the Fourth Amendment right to search her person, property, personal effects, vehicle, and residence. Here, while denying the motion to suppress, the trial court said:

"The evidence in this case indicates that the officers spoke with a female who indicated that the defendant lived with her boyfriend Vincent at this particular address. It's not clear to me whether that by itself would be enough if the officers immediately rushed over and conducted a fourth search of the residence, because as has been correctly pointed out by the defense, not expressly, but impliedly, someone could lie about where someone lives.

"The officer in this case attempted to corroborate the information. Had he not seen the defendant at any time when he surveilled, I think that would be some evidence from the defense to support the defense conclusion that there wasn't sufficient evidence to conclude in the absence of paper work that this was a place where defendant Nester was residing. Whether or not she owned the place is irrelevant.

"But he happened to see her two times. And beyond that he saw her doing things that appeared at least to corroborate what he had been told about the defendant Nester living with her boyfriend Vincent. He didn't just see her knock on the door and drive her away. He saw her come out of the residence, go to a vehicle and then go back inside on two separate occasions.

"I think any reasonable person would have a right to conclude that that's very strong evidence that that person has a residence interest in the place that's being surveilled. Is it conclusive proof?

"Of course not, but the Fourth Amendment law talks about what is reasonable for an officer to conclude. And I don't think I can conclude as a matter of law that his observations coupled with a -- with the very specific information he received from the other female was insufficient to conclude that Ms. Nester lived at that residence. So it seems to me they had a right to conduct a Fourth Amendment search of that residence."

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) Substantial evidence is evidence of legal significance, reasonable in nature, credible and of solid value. (*People v. Samuel* (1981) 29 Cal.3d 489, 505.) While reviewing the trial court's factual determination, we must review the entire record in the light most favorable

to the judgment below and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) Here, the record includes evidence that Maria Prieto told officers Nester lived at 4430 Maple Street with Vincent Gallegos. During the next week or so, Morales saw Nester at the residence twice acting in a manner consistent with one who lived there. This corroborated the information that Nester resided with Gallegos at that address. A reasonable person could believe that Nester resided at 4430 Maple Street. The search of 4430 Maple Street did not exceed the scope of the probation waiver.

III

Nester contends her Fourth Amendment waiver is unconstitutional because it does not serve the rehabilitative purpose of misdemeanor informal summary probation. We disagree. At the outset we note Nester did not object to the probation condition when it was imposed. She cannot do so for the first time on appeal. (*People v. Welch* (1993) 5 Cal.4th 228, 235.) In any case, probation conditions are a means of seeking to rehabilitate a defendant convicted of criminal activity. (*Griffin v. Wisconsin* (1987) 483 U.S. 868, 875.) Nester was on probation for possessing a controlled substance. (Health & Saf. Code, § 11377, subd. (a).) A probation condition is invalid only if it has no relation to the offense in question, relates to conduct which is not itself criminal, and requires or forbids conduct which is not related to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486.) Waiver of Fourth Amendment rights is related to possession of drugs and future criminality. As Nester recognizes, there is no legal authority for making a distinction between misdemeanor and felony probation.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

KREMER, P. J.

O'ROURKE, J.